Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local 13 *and* Stone Tire Service and Off-Dock Unlimited and International Longshoremen's and Warehousemen's Union, Party to the Contract

Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local 13 *and* Dostal Enterprises, Inc. and International Longshoremen's and Warehousemen's Union, Party to the Contract. Cases 21-CE-243 and 21-CE-245

June 22, 1981

DECISION AND ORDER

On November 12, 1980, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Pacific Maritime Association, herein referred to as PMA, and International Longshoremen's and Warehousemen's Union, herein referred to as ILWU, filed exceptions and supporting briefs and the General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The present controversy concerns certain provisions in a collective-bargaining agreement between the ILWU and the PMA and the decision of a PMA member, California United Terminals, herein referred to as CUT, barring entry to its leased premises by other employers who are engaged in repair and maintenance work on shipping containers and trailer chassis. The instant complaint, based on charges filed by employers whose operations were adversely affected by that agreement, alleges that Respondents violated Section 8(e) of the Act by entering into a contract or agreement containing these provisions and that these employers were barred from entry onto CUT's premises because their employees performing such maintenance and repair work were not represented by the ILWU. In his Decision, the Administrative Law Judge concluded that the bargaining agreement, as reaffirmed by a memorandum of understanding between ILWU and CUT on June 19, 1979, had no causal connection with the decision of CUT to bar other employers from doing business on its premises. To the contrary, he found that CUT's actions were the result of its decision to provide, through a subsidiary, the services previously performed by these other employers on these premises, and as such was based on business competition, not the disputed terms of the bargaining agreement. No party has excepted to this conclusion.

The Administrative Law Judge, however, further examined the language of the disputed provisions, and found that they came within the literal wording of Section 8(e) of the Act. For the reasons stated below, we disagree with this conclusion of the Administrative Law Judge.

The disputed clauses, contained in the ILWU/PMA bargaining agreement effective from July 1, 1978, through July 1, 1981, provide as follows:

> 1.7 This Contract Document shall apply to the maintenance and repair of containers of any kind and of chassis, and the movement incidental to such maintenance and repair. (See Section 1.8.)
>
> 1.71 This Contract Document shall apply to the maintenance and repair of all stevedore cargo handing equipment. (See Section 1.8.)
>
> 1.8 Any type of work assigned herein in Sections 1.43, 1.44, 1.6, 1.7 and 1.71 to longshoremen that was done by nonlongshore employees of an employer or by subcontractor pursuant to a past practice that was followed as of July 1, 1978, may continue to be done by nonlongshore employees of that employer or by subcontractor at the option of said employer.
>
> 1.81 An employer in a port covered by this Contract Document who joins the Association subsequent to the execution hereof and who is not a party to any conflicting longshore agreement becomes subject to this Contract Document.

While the June 19, 1979, memorandum of understanding specifically referred only to section 1.7 of the bargaining agreement, it also stated that CUT recognizes its obligation to comply with all of the provisions of the bargaining agreement.

We agree with the Administrative Law Judge's finding that the June 19, 1979, memorandum of understanding constituted an "entering into" of the above-cited contract provisions within the purview of Section 8(e) of the Act, thereby requiring an examination of the legality of these terms on their face.[2] We further agree with him that section 1.8 is, in effect, a "grandfather" clause that permits the past practice of using nonlongshoremen employees by employers and their subcontractors when such

[1] The PMA has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] See *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. (Clyde E. Mitchell, General Contractor)*, 240 NLRB 471, 473 (1979).

practices were followed as of July 1, 1978. However, contrary to the Administrative Law Judge, we do not find that section 1.8 or any of the above-cited provisions are violative of Section 8(e) of the Act.

In determining the facial validity of contract clauses alleged to be violative of Section 8(e) of the Act, the Board has established certain rules of construction. As summarized in *J. K. Barker Trucking Co.*,[3] these rules provide:

> Thus, if the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause. [*Id.* at 517.]

Using these rules of construction, it is clear that sections 1.7 and 1.71 serve to define the work of employees covered by the collective-bargaining agreement. The Administrative Law Judge has not found these clauses violative of Section 8(e) of the Act, and it is clear from the record that unit employees in several west coast ports working under the terms of the ILWU/PMA bargaining agreement perform such work.[4] Further, section 1.81 has not been found to be violative of Section 8(e) of the Act, and it is clear that this clause lawfully provides that employers who join the PMA after the execution of the bargaining agreement are subject to its terms. Consequently, the sole issue is whether section 1.8 of the agreement, the "grandfather" clause, expressly or impliedly violates Section 8(e) of the Act.

Section 1.8 states that unit work, including that defined in sections 1.7 and 1.71, which was performed by nonlongshoremen employees of an employer or subcontractor prior to the effective date of the bargaining agreement, may continue to be done by the same employees at the option of the employer. The obvious purpose of this disavowal of work jurisdiction, where a contrary past practice exists, is to avoid requiring PMA members to cease doing business with other employers whose employees are not represented by the ILWU. This disavowal, by its express terms, was not found to be unlawful under Section 8(e) of the Act. However, the Administrative Law Judge additionally drew the inference that section 1.8 also amounted to an affirmative agreement that PMA members would cease or refrain from doing business with subcontractors who did not fall within the express coverage of section 1.8. Although we do not disagree with the Administrative Law Judge that, as a matter of logic and grammatical construction, this clause is capable of being interpreted in this manner, we do not consider it warranted to apply this clause mechanistically beyond its obvious purpose of disavowing certain work without some proof that it was intended to be administered in an unlawful manner. See *J. K. Barker*, 181 NLRB at 521. As the record is silent regarding the intent of the parties during the negotiation of this collective-bargaining agreement and because the Administrative Law Judge found no unlawful administration of this disputed contract term,[5] we find the evidence insufficient to resolve the ambiguity as to whether section 1.8 was an implied agreement in violation of Section 8(e) of the Act, as found by the Administrative Law Judge. Accordingly, we shall order that the complaint herein be dismissed in its entirety.[6]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[3] *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (J. K. Barker Trucking Co.)*, 181 NLRB 515 (1970).

[4] See sec. III, B, of the Administrative Law Judge's findings of fact.

[5] Statements by Local 13 Secretary-Treasurer Raul Olvera to IAM Business Representative Burniston in April or May 1979 that the ILWU was going to do all the mechanical work at the new facility and eventually all such work in the whole harbor to the exclusion of the IAM is not sufficient evidence of unlawful contract administration. Olvera's statement to the IAM representative made no reference to the ILWU/PMA bargaining agreement. In any event, no PMA member acquiesced in or gave consent to these statements by Olvera. See *General Drivers, Warehousemen and Helpers of America, Local Union No. 89, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Robert E. McKee, Inc.)*, 254 NLRB No. 93 (1981). (Chairman Fanning dissenting on other grounds.)

[6] In view of our disposition of the case, we do not pass upon the Administrative Law Judge's discussion of work preservation in relation to the traditional bargaining unit work of ILWU-represented employees.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard at Los Angeles, California, on May 20, 21, 22, and 23, 1980. The charge in Case 21-CE-243 was filed on July 11, 1979, by Stone Tire Service (herein called Stone Tire) and Off-Dock Unlimited (herein called Off-Dock). The charge in Case 21-CE-245 was filed on July 18, 1979, by Dostal Enterprises, Inc. (herein called Dostal). An order consolidating those cases and a complaint issued on October 31, 1979, alleging that Pacific

Maritime Association (herein called PMA) and International Longshoremen's and Warehousemen's Union, Local 13 (herein called ILWU Local 13) violated Section 8 (e) of the National Labor Relations Act, as amended. The complaint names International Longshoremen's and Warehousemen's Union (herein called ILWU) as a party to the contract. By Order dated January 18, 1980, the Regional Director for Region 21 of the National Labor Relations Board permitted International Association of Machinists and Aerospace Workers, District Lodge 94, Local Lodge 1484 (herein called IAM) to intervene in these proceedings as though a party.

Issues

The primary issues are:

1. Whether PMA on behalf of its employer-members and the ILWU on behalf of its locals including ILWU Local 13 entered into a contract under which such employers agreed to cease doing business with other persons.

2. If such a cessation of doing business was provided for in the contract, whether such a cessation involved a preservation of bargaining unit work.

3. Whether California United Terminals or other employers ceased doing business with Stone Tire, Off-Dock, or Dostal pursuant to the terms of such a contract.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, PMA, ILWU Local 13, ILWU, and IAM.

Upon the entire record of the case,[1] and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. THE BUSINESS OF THE EMPLOYERS

PMA, a California corporation with its principal place of business in San Francisco, California, and a branch office at Wilmington, California, is an association of employers whose employer-members are engaged in business in California, Oregon, and Washington as steamship companies, stevedore contractors, or operators of marine terminals, or in combinations thereof. PMA was organized for the purpose of, *inter alia*, negotiating and entering into collective-bargaining agreements on behalf of its employer-members with various unions including ILWU and ILWU Local 13. The employer-members of PMA, which bargain collectively through PMA, annually derive gross revenues in excess of $50,000 from the transportation of goods and passengers between California and other States or foreign countries. PMA and its employer-members are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Stone Tire is engaged in the business of repairing tires of container chassis at its facility in Wilmington, California. Stone Tire annually performs services valued in excess of $50,000 for customers, each of which, in turn, derive annual revenue in excess of $50,000 from the transportation of goods and passengers between California and other States or foreign countries. Off-Dock is in the business of repairing containers and chassis at its facility in Wilmington, California. Stone Tire and Off-Dock are commonly owned by Samuel L. Stone. During the initial 5 months of its operation, Off-Dock performed services valued in excess of $50,000 for customers, each of which, in turn, derive annual revenue in excess of $50,000 from the transportation of goods and passengers between California and other States or foreign countries. Dostal, an Illinois corporation, is engaged in the business of container repair and maintenance at various facilities including those located at the ports of Long Beach and Los Angeles, California. During the past 12 months, Dostal performed services valued in excess of $50,000 for customers, each of which, during the same period, in turn, derived annual revenue in excess of $50,000 from the transportation of goods and passengers between California and other States or foreign countries. Stone Tire, Off-Dock, and Dostal are employers within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

ILWU and ILWU Local 13 are and each is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *An Overview*

This is one of a number of cases that has its roots in the "container revolution" that began on the longshores of the United States about 1960. Prior to that time ships were loaded and unloaded by longshoremen represented by the ILWU and its locals, who performed their work through the use of traditional stevedoring equipment such as cargo nets, lift and pallet boards, and wire slings. It was customary for longshoremen to maintain and repair such equipment. As is set forth more fully below, such traditional equipment gave way in large measure to the use of large metal containers[2] that could be loaded and unloaded (stuffed and stripped) away from the port. Such containers were claimed by the longshoremen to be the functional equivalent of the hold of a ship. The containers were lifted on and off the ship by means of a crane and much of the traditional longshore work was eliminated. Machinists represented by IAM and its locals have traditionally maintained and repaired mechanical

[1] Pursuant to a stipulation of the parties, a late-filed exhibit was received in evidence after the close of the hearing. It has been added to the original exhibit file as Int. Exh. 10(a).

The unopposed motion of the General Counsel to correct the transcript of the record is hereby granted.

[2] Containers are described by the Supreme Court in *N.L.R.B. v. International Longshoremen's Association, AFL-CIO, et al.*, 447 U.S. 490 (1980), as follows:

> Containers are large, reusable metal receptacles, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specially designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.

equipment. With the advent of containerization in the Los Angeles-Long Beach Harbor area which is within the jurisdiction of ILWU Local 13,[3] the machinists began performing the maintenance and repair work on the containers and the chassis on which containers are carried.

A longrunning dispute has existed between the ILWU and the Teamsters concerning the stuffing and stripping of containers and that matter has not yet been fully resolved. See *N.L.R.B.* v. *International Longshoremen's Association, supra.* The underlying dispute in the instant case is between the ILWU and IAM. Both claim that maintenance and repair work on containers and chassis should be performed by members of their locals. The jurisdictional dispute aspects of the conflicting claims are not directly at issue in this case and are relevant only to the extent that they shed light on the ILWU's claim that certain contract clauses preserve work that has traditionally been done by ILWU members. The complaint alleges that PMA on behalf of its employer-members entered into contract with ILWU on behalf of its locals including Respondent Local 13, which in essence prevented the employer-members of PMA from doing business with other employers who did not use longshoremen.

California United Terminals (herein called C.U.T.) is an employer-member of PMA. It now operates a large shipping terminal facility in Long Beach Harbor. Longshore work was performed at that facility before C.U.T. began its current operation there. Also before the current operation began, the Charging Parties, Stone Tire, Off-Dock, and Dostal, performed services at the facility for various shipping companies. After C.U.T. began its new operation, it prevented Stone Tire, Off-Dock, and Dostal from entering those facilites to perform the services that they had previously done. The General Counsel contends that Stone Tire, Off-Dock, and Dostal, none of whom used employees represented by the ILWU or its locals, were prevented from using that facility because of the agreement that the PMA had with the ILWU and because of a supplemental agreement that C.U.T. entered into with the ILWU. C.U.T. contends that all subcontractors were excluded from its new facility and that that was done for valid business reasons which had nothing to do with any agreement with the ILWU.

ILWU Local 13 sought to obtain a contract with C.U.T. under which C.U.T. would employ longshoremen and IAM sought to obtain a contract with C.U.T. under which C.U.T. would employ machinists. To the extent that they both sought to represent C.U.T. employees, the Unions had a jurisdictional dispute. However, this case involves an alleged violation of Section 8(e) of the Act and there is no allegation that Section 8(b)(4)(D), which involves jurisdictional disputes, was violated. There are three key questions that must be answered in this case. The first is whether Stone Tire, Off-Dock, and Dostal were prevented from doing business with other employers pursuant to a contract the other employers had with the ILWU; the second is whether the contract on its face prevented one employer from doing business with another; and the third is whether the contract lawfully preserved work or unlawfully attempted to acquire work.

B. *The History of the Work in Question*

Machinists represented by the IAM and longshoremen represented by the ILWU both worked at the Long Beach-Los Angeles ports even prior to the advent of containerization in 1959 or 1960. Basically the longshoremen loaded and unloaded the ships with the use of cargo handling equipment such as wire slings, rope nets, lift and pallet boards, barrels, and similar gear.[4] Longshoremen performed the maintenance and repair work on such equipment. Coopers who were represented by the ILWU repaired the barrels. Machinists represented by the IAM repaired and maintained some cargo handling equipment such as moving equipment, trucks, mobile cranes, tractors, lift trucks, and other mechanical equipment used in the loading and unloading of ships. They also did some fabrication and welding work.

In 1951, ILWU Local 13 began organizing certain gear shops, which were facilities operated by stevedores, where tractors, cranes, and other equipment was kept in repair. To avoid a jurisdictional conflict, ILWU Local 13 and IAM entered into an agreement wherein they set forth their jurisdictional boundaries. The agreement described the division of work on the dock that had traditionally been maintained. It provided that the IAM had sole jurisdiction over men employed by the waterfront employers of Long Beach, San Pedro, and Wilmington harbors as "mechanics, machinists, their apprentices and helpers, and/or welders, to build, repair, and maintain all automotive and mechanical equipment, such as automobiles, trucks, tractors, cranes, 4 wheelers, pipe trucks, lift trucks and all mechanical equipment used in the loading or unloading of ships, trucks and railroad cars." The agreement further provided that ILWU Local 13 had sole jurisdiction over all men employed by the waterfront employers of Long Beach, San Pedro, and Wilmington harbors as "gear men whose duties consist of cable splicing, transporting to and from the docks all stevedoring equipment used in the loading and unloading of ships, trucks and railroad cars, the repair and maintenance of lift and pallet boards, the refueling of equipment on the docks and the installation of whinch handles aboard ships."

The Master Contracting Stevedores Association of Southern California was formed about 1952. Since that time the IAM has had master contracts with that Association and IAM machinists have performed the work described above pursuant to those contracts.

In 1959 or 1960, Matson and Sealand of California introduced containerization to the docks. Machinists performed the repair and maintenance work on containers for both of those companies with the exception that

[3] ILWU Local 13's territorial jurisdiction is in and about the Los Angeles and Long Beach harbor areas. It is limited on the north by the jurisdiction of ILWU Local 46 which is located at Port Hueneme and on the south by the jurisdiction of ILWU Local 29 which is located in San Diego.

[4] Cargo nets and wire slings are used to hoist cargo aboard the ships. The wire slings are hooked onto lift, plaster or pallet boards to hoist cargo aboard.

Longshoremen sometimes installed temporary patches on containers.

To a large extent, the use of cargo nets, wire slings, lift boards, pallet boards, plaster boards, and barrels has given way to the use of containers. However, the traditional means of loading and unloading ships are still used to some extent.

When containers were introduced onto the docks ILWU Local 13 made no claim to the work of maintaining and repairing the containers and the chassis upon which the containers were carried. The only claim that it made was with regard to such matters as cleaning the containers and doing temporary patch work on them. The situation remained substantially the same within the jurisdiction of ILWU Local 13 until the execution of the July 1, 1978, agreement between PMA and the ILWU, which is discussed in detail below. Before that time, machinists represented by the IAM performed the repair and maintenance work on containers and chassis and any minor jurisdictional disputes that arose were resolved by the IAM and the ILWU Local 13 under the terms of the 1951 and subsequent jurisdictional agreements.

In 1966 IAM and ILWU signed an understanding applicable to California, Oregon, Washington, Alaska, and Hawaii under which both Unions agreed to cease and desist from attempts to try to take over the members of the other union in shops under contract with either union.

Effective January 24, 1973, the IAM and ILWU Local 13 entered into another agreement to define their jurisdictional boundaries. That agreement for the first time made specific reference to containers. It stated that the ILWU would have jurisdiction over rough cleaning of containers and that the IAM would have jurisdiction over the steaming of containers. The agreement was consistent with the practice that had developed on the dock. It provided that the ILWU would do "the temporary container patch work (with tape) in the ship or on the outside dock area other than in the shop." It also provided that the IAM would "repair all containers, including welding, cutting, burning, riveting, stationary flooring, and mechanical work, as well as refrigeration work including the repair, maintenance and checking of the temperature charts." The agreement specifically gave the IAM the work of "container and trailer road checking." In addition it gave the IAM jurisdiction over the repair of tires and wheels. It was agreed that the jurisdictional understanding was to pertain to all existing facilities and was to extend to all future facilities in the Los Angeles and Long Beach harbors.

PMA was not a party to the 1973 jurisdictional agreement and PMA has taken the position that it is not bound by that agreement.

The contracts between PMA and the ILWU cover a coastwide unit. However, supplemental local agreements and area practices are not the same. While ILWU Local 13 did not claim repair and maintenance work on containers or chassis prior to the July 1, 1978, PMA-ILWU contract, some other ILWU locals did claim that type of work.

On October 7, 1969, ILWU entered into an agreement with Seatrain Terminals under which Seatrain agreed to be bound by the coastwide PMA contract. That agreement covered the maintenance and repair of the employer's gear and equipment used for longshore operations. On June 9, 1972, ILWU Local 10 in Oakland, California, entered into an agreement with Seatrain Terminals which specifically covered repair and maintenance of containers and chassis at Seatrain's Oakland terminal. That contract, with various modifications, has been extended through July 1, 1981. However, the last contract which runs from July 1, 1978, to July 1, 1981, provides that Seatrain can follow past practice with regard to contracting through subcontractors who use nonlongshoremen employees if that was the past practice followed as of July 1, 1978. On March 1, 1980, American President Lines, the company that took over Seatrain's Oakland terminal, agreed with Local 10 that the Seatrain contract would be assumed by American President Lines.

On December 1, 1978, ILWU, ILWU Local 10, and various other unions in the San Francisco area entered into a jurisdictional agreement that was signed by American President Lines under which longshoremen were assigned some maintenance and repair work of containers and chassis.

On July 1, 1972, PMA entered into an agreement with ILWU Local 29 covering the San Diego area. It was agreed that in that area container and repair work was to be done under the contract when it was performed at facilities of employer-members in the San Diego area.

On February 25, 1975, American Transportation Center in Seattle, Washington, entered into an agreement with ILWU Local 52A covering maintenance and repair of containers in the company's Seattle operation.

The PMA-ILWU contract that is in issue in this case was executed on July 1, 1978. On the same date, ILWU Local 19, in Seattle, entered into a contract with various employers in the Seattle area which covered repair and maintenance of equipment used in stevedore operations. That contract permitted existing practices where non longshore employees had performed work prior to July 1, 1978.

On August 26, 1978, PMA entered into contract on behalf of its employer-members in the Portland, Oregon, area with ILWU Local 8 covering repair and maintenance of equipment used in stevedoring operations. That contract permitted existing practices which used nonlongshore employees where the work was performed since January 1971.

The C.U.T. operation is discussed in detail below. At the present time longshoremen represented by ILWU Local 13 do some of the mechanical work at American President Lines within the territorial jurisdiction of ILWU Local 13. Longshoremen also do the maintenance and repair work at American Bulk Loading Enterprises in the Los Angeles-Long Beach harbor area. On April 9, 1979, in Case 21-RC-15830 the Board certified ILWU Local 13 as the bargaining agent of American Bulk Loading Enterprises, Inc., employees in a unit of all mechanics and maintenance employees employed by the employer at its facility at Berth 49, San Pedro, California.

C. *The July 1, 1978, PMA–ILWU Contract and the C.U.T. Contract*

On July 1, 1978, PMA on behalf of its employer-members and ILWU on behalf of itself and its member locals in California, Oregon, and Washington including ILWU Local 13 entered into a collective-bargaining agreement which read in part:

> 1.7 This Contract Document shall apply to the maintenance and repair of containers of any kind and of chassis, and the movement incidental to such maintenance and repair. (See Section 1.8.)
>
> 1.71 This Contract Document shall apply to the maintenance and repair of all stevedore cargo handling equipment. (See Section 1.8.)
>
> 1.8 Any type of work assigned herein in Sections 1.43, 1.44, 1.6, 1.7 and 1.71 to longshoremen that was done by nonlongshore employees of an employer or by subcontractor pursuant to past practice that was followed as of July 1, 1978, may continue to be done by nonlongshore employees of that employer or by subcontractor at the option of said employer.
>
> 1.81 An employer in a port covered by this Contract Document who joins the Association subsequent to the execution hereof and who is not a party to any conflicting longshore agreement becomes subject to this Contract Document.

The contract was effective by its terms from July 1, 1978, through July 1, 1981. It was a re-execution and amendment of the 1975–78 Pacific Coast Longshore and Clerks' Agreement. Section 1 of the 1975–78 contract described the work covered by that document. It did not make any mention of the maintenance and repair of containers or chassis. Section 1.5 (b) of that contract provides: "Where Pacific Maritime Association or its member companies have existing bargaining relationships, have granted recognition to, and have assigned work to bona fide labor unions as a result of such relationships and recognition . . . International Longshoremen's and Warehousemen's Union will not make any jurisdictional claim . . . ."

C.U.T. is a member of PMA and as such it is bound by the July 1, 1978, PMA–ILWU contract. As is set forth fully below, C.U.T. now performs maintenance and repair work on containers and chassis at its facility in Long Beach harbor. C.U.T. performs that work through Mobile Transportation Services which is a subsidiary of C.U.T. formed for that purpose.

On June 19, 1979, C.U.T. and the ILWU entered into a contract under which C.U.T. agreed that, beginning 15 days after it received approval from the Federal Maritime Commission to operate the facility at which it proposed to perform maintenance and repair work, it would perform such work pursuant to the provisions of Section 1.7 of the July 1, 1978, PMA–ILWU contract.

C.U.T. has not fully followed that contract with regard to maintenance and repair of containers and chassis. C.U.T. contends that wages were not spelled out by the PMA–ILWU contract and that it has followed the ILWU's contract with Seatrain in Oakland in determining wages. It has followed the July 1, 1978, PMA–ILWU contract with regard to fringe benefits. C.U.T. asserts that it entered the separate contract because it wanted specific assurance that it could hire its own men and did not have to train employees.

D. *The Work of C.U.T., Stone Tire, Off-Dock, and Dostal*

C.U.T. is in the business of operating marine terminal facilities. It provides berthing for vessels, provides shed space, and receives and delivers cargoes. C.U.T. has been a member of PMA for at least 10 years.

About 1966 C.U.T. began operating a terminal facility in Wilmington, California. At that facility the shipping companies that were C.U.T.'s customers made their own arrangements for the repair and maintenance of containers and chassis. Ordinarily the containers were either owned by or leased by the shipping companies. In some instances a shipping company would request C.U.T. to make the arrangements to have repairs done on containers or chassis. An employee of C.U.T. would make the arrangements to have an outside vendor do the work. That employee obtained bids, awarded the work, and saw to it that the work was done. He also approved the invoices and forwarded those invoices to the shipping line for payment. C.U.T. terminated its Wilmington operation in the latter part of 1978.

C.U.T. also provided terminal services in Long Beach, California. That facility is owned by the city of Long Beach. Until July 1979 C.U.T. had a preferential assignment and only a limited responsibility at that terminal. The Long Beach terminal was a break-bulk facility where traditional loading techniques were utilized and only a limited number of containers were used. While it had its preferential assignment, C.U.T. did not do any maintenance work on the shipper's containers or chassis. The repair and maintenance of containers and chassis were handled by the shipping lines. Those shipping lines contracted with various outside vendors who came onto the Long Beach terminal and performed the work. Stone Tire, Off-Dock, and Dostal were some of those outside vendors who came onto the Long Beach terminal to do the maintenance and repair work. Ordinarily only minor work was done on the terminal and major work was taken out of the terminal to be performed at outside shops.

Stone Tire performs truck tire repair on container chassis. Its employees are represented by the IAM and it has a collective-bargaining contract with that union. It performed that work at the Long Beach terminal for such shipping companies as Pacific Australian Direct, Pacific Island Transport, United Yugoslav Line, Neptune Orient Lines, and Lykes Lines. Pacific Australian Direct and Pacific Island Transport are members of PMA.

Off-Dock is owned by Samuel Stone who also owns Stone Tire. Off-Dock has been in operation since about November 1978. It is in the business of repairing containers and chassis. It had a collective-bargaining relationship with the IAM but at the present time does not have a contract with any labor organization. Off-Dock per-

formed services at the Long Beach terminal for the same shipping lines that Stone Tire worked for.

Dostal is in the business of repairing trailers, containers, chassis, and refrigeration equipment. It performed maintenance work on containers, chassis and refrigerator containers for Lykes and for Merse at the Long Beach terminal. Dostal has a contract with IAM.

Stone Tire, Off-Dock, and Dostal sent their employees to the Long Beach terminal to do work for the various shipping companies on the terminal property.None of them had business relations with C.U.T. except that Dostal did some electrical work for C.U.T. on C.U.T.'s own equipment.

In the latter part of 1976 or early 1977, C.U.T. began negotiating with the city and Port of Long Beach for C.U.T. to lease the entire 113 acre Long Beach terminal and to create a full-service omniterminal which would provide all the services needed by shippers in a modern container terminal. At that time, shipping companies paid a wharfage fee. That money accrued directly to the Port of Long Beach. C.U.T. only received fees that it negotiated with the shipping companies. Together with the negotiations for the lease, C.U.T. began planning an extensive expansion program. Part of the plan was for C.U.T. to use its own employees to perform repair and maintenance work on containers and chassis when the work was done at the Long Beach terminal. That practice is generally followed in omniterminals. C.U.T. planned to undertake that work when it obtained the lease because it did not make economic sense for it to lease the entire port and then have outside vendors use the leased property when C.U.T. could make a profit from doing the work itself on its own leasehold. In addition, C.U.T. desired to control the work on its own leasehold in order to reduce insurance costs. It was always anticipated, and it is the practice today, that a shipping company can remove its containers and chassis from the terminal, and have the work done by anyone the steamship company chooses outside of the terminal. In order to remove a container or chassis from the terminal the shipper has to pay the normal handling fees to C.U.T. Those fees amount to about $27.50 to remove or bring back a container and about $10 to remove or bring back a chassis. Those fees are paid by the shipping company when their equipment is moved from or taken to the terminal no matter what the reason for the transfer.

C.U.T. invested about $44 million in modernizing the terminal. On July 2, 1979, C.U.T.'s lease of the terminal from the city and Port of Long Beach was approved by the Federal Maritime Commission and the 113 acres became a C.U.T. facility. From then on C.U.T. paid rent to the city and Port of Long Beach on the entire 113 acres.

In April or May 1979, IAM Business Representative Thomas Burniston had a conversation with ILWU Local 13's Secretary-Treasurer Raul Olvera. Olvera said that the Longshoremen's Union was going to do all the mechanical work at the new facility and eventually would do all mechanical work in the whole harbor operation. Olvera also said that there would be no Machinists Union whatsoever on the docks. Burniston said that that was not going to happen and that he would strike those companies that were involved. Olvera then said that the ILWU would strike and close down the place if the companies did not go with his Union.

In anticipation of C.U.T. doing the repair and maintenance work on the containers and chassis, both ILWU Local 13 and IAM sought to negotiate agreements with C.U.T. under which members of those Unions would do the work. About July 1979, Thomas R. Burniston, a business representative for the IAM, went to the office of Charles Doan, the vice president of C.U.T., to discuss the matter. Burniston asked Doan to use machinists and to sign a contract for the new C.U.T. terminal. Burniston gave Doan a copy of the IAM contract. Doan said that he would have to go with the Longshore Union. Burniston told Doan that if longshoremen did mechanical work, the IAM might call a strike and Doan replied that if the machinists did the mechanical work, the longshoremen might do the same. Sometime later, Burniston spoke to Doan on the phone and Doan said that C.U.T. was going to go with the Longshore Union because of the PMA contract language.[5]

The memorandum of understanding between C.U.T. and the ILWU under which C.U.T. agreed to be bound by Section 1.7 of the July 1, 1978 ILWU-PMA contract after C.U.T. received approval from the Federal Maritime Commission to operate the new facility is dated June 19, 1979. That approval was received on July 2, 1979. Before that date, C.U.T. notified all the shipping lines who used the Long Beach terminal that when C.U.T. received the Federal Maritime Commission approval C.U.T. would perform the minor container repair and chassis repair as part of its terminal service.[6] C.U.T. informed all of the shipping lines who used the terminal that if the shipping lines wanted companies other than C.U.T. to provide maintenance and repair services those services would have to be performed off of the C.U.T. terminal.

Stone Tire, Off-Dock, and Dostal were also told that after C.U.T. began doing its own work they would no longer be allowed to perform work at the C.U.T. terminal.

About June 21, 1979, Samuel Stone, the owner of Stone Tire and Off-Dock, had a conversation with C.U.T.'s vice president, Charles Doan. Stone said that he wanted to perform the work at the C.U.T. facility and Doan replied that C.U.T. would perform the work itself. Doan said that C.U.T. was paying rent on the property and was not in the business of having other people come in and use the facility to make a living. He also said that C.U.T. would perform the work regardless of what union was involved. In the course of that conversation

[5] In a newsletter to its members dated November 17, 1978, ILWU Local 13 said that the Union hoped to acquire some new jobs at the C.U.T. terminal as per the new language in sec. 1 of the contract.

[6] As noted above, C.U.T. is performing that work through its subsidiary Mobile Transportation Services. The C.U.T. facilities are still under construction and are not scheduled to be fully completed until February or March 1981. At that time C.U.T. plans to do more extensive repair work.

Doan said that the ILWU workers would be doing the work.[7]

Joseph Lumsdaine, the attorney for Stone Tire and Off-Dock, testified that he had a telephone conversation with Doan on July 9, 1979. According to Lumsdaine's testimony: Lumsdaine told Doan that he had been informed by Stone that C.U.T. was going to be doing the work that Stone Tire and Off-Dock had been doing and he asked why that was so; Doan replied that C.U.T. was only going to do roadability tests and not other mechanical work, and that there were problems with use of the property, union considerations, and insurance; Lumsdaine asked what would happen if his client's mechanics became ILWU; Doan said that if they did become ILWU the other problems would work themselves out; and Doan said something to the effect that C.U.T. was not really interested in the mechanical work, but that the contract required longshoremen. Doan testified that he did not recall any such conversation with Lumsdaine. I am unable to credit Lumsdaine. The credible testimony of Doan as well as C.U.T.'s vice president, David Hoekstra, established that C.U.T. had been planning for a long time to do the work itself and to prohibit all contractors from coming onto the C.U.T. premises and competing with C.U.T. for work on its own leasehold. C.U.T. has performed all of that work on those premises and has not contracted out work either to contractors who had a contract with the ILWU or a contract with the IAM. I do not credit Lumsdaine's assertion that Doan told him in effect that the situation would be changed and C.U.T. would give up the work to Stone Tire and Off-Dock if they used ILWU workers.

On July 2, 1979, Stone was told by a representative of United Yugoslav Line that as of July 16, 1979, Stone Tire would no longer be permitted to perform repair work on United Yugoslav Line equipment at the C.U.T. terminal. Stone was told the same thing by an agent of Neptune Orient Lines. About the same date, Stone's wife, Katherine Stone, was told by a representative of United Yugoslav Line that as of July 16 no outside vendors would be allowed at the C.U.T. terminal. A representative of Lykes Lines called her to say that Stone Tire was no longer going to be able to do its tire repair work at the C.U.T. terminal. On June 20, 1979, a representative of Lykes Lines called Walter Rickertt, the West Coast manager for Dostal, and told him that the ILWU would be doing the maintenance at C.U.T. and that Dostal would no longer be allowed to come on the terminal. On July 13, 1979, O. Michael Larson, manager of Lykes Lines container department, wrote to Stone Tire and Dostal saying that C.U.T. had decided that as of July 15, 1979, all work done on the terminal would be done by ILWU mechanics. The letter also said that the effect of that move was that outside vendors would be prohibited from performing any services on the terminal Larson testified that about May 1979 he was told by Doan of C.U.T. that outside vendors would no longer be allowed on the terminal and that C.U.T. would be doing its own maintenance and repair work on its terminal. He averred that he did not recall any conversation with anyone from C.U.T. with regard to the work being performed by ILWU mechanics. He testified that he did talk about that matter to other people in the industry but he did not recall who they were and he based his letter on things he heard.

Since July 16, 1979, Stone Tire, Off-Dock, and Dostal have not performed any work on the premises of C.U.T.'s terminal. The same is true for all other outside vendors. Stone Tire and Off-Dock now do their work on their own premises. They have invested a substantial amount of money in a new facility and on new equipment with which they remove customer's equipment from the C.U.T. terminal to perform the work on their own premises. Some of the work that they performed at the C.U.T. premises is now performed on their own premises. Since July 1979 Stone Tire and Off-Dock have increased their revenues and they have retained some of the customers for whom they had done work at C.U.T. Neptune Orient Line and Lykes Lines continue to have Stone Tire do their tire repair work, but it is now done on Stone Tire's premises rather than at C.U.T. Other lines have stopped doing business with Stone Tire and Off-Dock and have their work done at the C.U.T. facility with C.U.T. employees. After July 16, 1979, tractors from Off-Dock went to the C.U.T. terminal but only to pick up chassis and containers to take them out for repair at Off-Dock's premises. Stone Tire still goes to the C.U.T. terminal to pick up flat tires and bring them to the Stone Tire premises for repair. Samuel Stone acknowledged in his testimony that generally, where a terminal furnishes its own repair services, the terminal does not allow vendors to come on the terminal to perform work there. He gave as an example Pacific Container Terminal which has its own tire repair company and no longer allows outside vendors to go on the terminal to perform that service.

Dostal did work for Lykes when it was permitted onto the C.U.T. terminal. It did not do any off-dock work for Lykes. When the new facility came into operation Dostal's business with Lykes ceased.

Since July 16, 1979, C.U.T. has performed all of the maintenance and repair work that has been done at its terminal with the use of its own employees. It has not contracted out any of that work and it has not allowed any outside vendors to come on the premises to perform that work. If C.U.T.'s customers want the work done on C.U.T.'s facility they must use C.U.T. to do the work. However, the customers have the right to remove any equipment to have the work done off the facility. Many customers do remove their equipment to have it maintained and repaired. The only charge that C.U.T. makes in that regard is a standard fee for handling the equipment in moving it in and out of the facility and the fee is the same no matter what the reason for the removal is.

[7] This finding is based on the credited testimony of Doan. Stone testified that during this conversation he asked whether it would facilitate matters if Stone Tire and Off-Dock had ILWU mechanics and that Doan said that he didn't know. I do not credit Stone in that regard. All the surrounding circumstances indicate that Doan intended to have the work performed by C.U.T. employees. C.U.T. has not contracted out any of the work in question. I do not credit Stone's assertion that in effect Doan left the contracting question open if Stone's companies obtained contracts with the ILWU.

Once the equipment leaves the terminal, C.U.T. has no control over who does the repair work.

E. *Analysis and Conclusions*

1. The refusal to allow Stone Tire, Off-Dock, and Dostal to perform work at the C.U.T. facility

Section 8(e) of the Act reads:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .[8]

That section deals with two separate questions. The first is whether an employer ceases doing business with any other person pursuant to a proscribed agreement and the second is whether an agreement is in itself unlawful. With regard to the first question, inquiry must be made into the reason that Stone Tire, Off-Dock, and Dostal were prevented from performing work at the C.U.T. facility. The second question, relating to whether or not the PMA–ILWU contract is a proscribed agreement, will be dealt with below.

Stone Tire, Off-Dock, and Dostal never had a business relation with C.U.T. at C.U.T.'s Long Beach facility[9] They did perform work for various shipping companies, some of whom were members of PMA, at the Long Beach facility. After July 16, 1979, when C.U.T. began using its own employees to perform all of the maintenance and repair work on containers and chassis at its Long Beach facility, Stone Tire, Off-Dock, and Dostal were no longer permitted to perform work at that facility. However they did not lose all of the work they had been performing. Stone Tire and Off-Dock opened their own facility and a substantial amount of the work that they had been performing at the Long Beach facility is now performed on their own premises. Stone Tire and Off-Dock have undertaken substantial capital outlays and their business has increased. In order to do business with the shipping companies that use the C.U.T. facility, Stone Tire and Off-Dock must now bring the shipping companies' equipment off the C.U.T. facility and work on it at their own premises. Some of the shipping companies have chosen to have C.U.T. do the work and in those cases Stone Tire and Off-Dock have lost the business. Stone Tire, Off-Dock, and Dostal have not been singled out because they do not have longshoremen employees. C.U.T. does no subcontracting and no contractors have been allowed onto the C.U.T. premises to perform the work. It does not matter whether a contractor's employees are represented by the Machinists, the Longshoremen, or anyone else, such contractors are not permitted to compete with C.U.T. by doing the work on C.U.T.'s premises that is now being performed by C.U.T. employees.

Both IAM and ILWU sought collective-bargainihg contracts with C.U.T. Both wished to represent C.U.T.'s employees. The ILWU prevailed and that Union rather than the IAM represents those employees. However Section 8(e) has no application to situations where two unions are competing to represent the employees of an employer. Sections 8(b)(4)(D) and 10(k) of the Act deal with such matters and they are not in issue in this case. Section 8(e) deals solely with agreements affecting the relationship between an employer and another person.

C.U.T. began planning for a major change in operations in late 1976 or early 1977. At that time it had a preferential assignment to the Long Beach facility and only a limited role in the operation of that facility. The plan was for C.U.T. to lease the entire 113-acre facility from the Port of Long Beach and to construct and operate a full-service, omniterminal facility. Part of the plan was for C.U.T. to provide the services that go with such a facility, some of which are the repair and maintenance of containers and chassis. It is customary for full-service terminals to provide such services with their own employees and to forbid outside vendors from coming onto the facility and performing such work in competition with the terminal. The plans were formulated well before the execution of the collective-bargaining agreements that are in issue in this case. C.U.T. proceeded with its plan, invested about $44 million at the terminal, and entered into a 30-year lease with the Port of Long Beach. C.U.T. provided services for its customers including maintenance and repair of containers and chassis. Such services were provided by its own employees. The shippers for whom C.U.T. provided such services were not required to have the work done on C.U.T.'s premises. They had the option of removing the equipment from the premises and having the work done by anyone they saw fit. Some of the work was sent off the premises and done by employees of other vendors whose employees were not represented by the ILWU. Once equipment left the C.U.T. facility, C.U.T. had no control over it. No charge was made for the removal of equipment by C.U.T. other than the customary equipment handling charge which C.U.T. assessed when equipment was removed for any reason.

Under all these circumstances, I do not believe that the General Counsel has established by a preponderance of the credible evidence that Stone Tire, Off-Dock, or Dostal were barred from doing work on the C.U.T. facility because of the collective-bargaining contracts which are under attack. Nor has it been established that PMA members ceased doing business with them because of the contracts. They lost the work because C.U.T. undertook that work with its own employees and C.U.T. did not want outside vendors competing for the work that was performed on the premises of the C.U.T. facility. The union consideration only came into the picture in the context of the IAM and the ILWU competing to

[8] Section 8(e) continues with provisos relating to the construction and garment industry which are not applicable here.

[9] With the exception that Dostal did some electrical work on some of C.U.T.'s own equipment. That work is not in issue in this case.

represent C.U.T.'s employees and such competition is not within the scope of Section 8(e) of the Act.

2. The contract clauses in question

Section 8(e) provides that it shall be an unfair labor practice for an employer to enter into[10] a contract whereby such employer agrees to cease doing business[11] with any other person.

On July 1, 1978, PMA, on behalf of its employer-members, and ILWU, on behalf of its locals in California, Oregon, and Washington (including ILWU Local 13) entered into a contract which is effective until July 1, 1981. Section 1.7 of that contract provides that the contract shall apply to maintenance and repair of containers and chassis and the movement incidental to such maintenance and repair. Section 1.71 provides that the contract will cover maintenance and repair of all stevedore cargo-handling equipment. While those clauses appear on their face to merely describe the work covered by the contract, they must be read in conjunction with section 1.8 which relates in part to the contracting out of work. Section 1.8 provides that the work assigned by sections 1.7, 1.71, and other sections of the contract "to longshoremen that was done by nonlongshore employees of an employer or by subcontractor pursuant to a past practice that was followed as of July 1, 1978, may continue to be done by nonlongshore employees of that employer or by subcontractor at the option of said employer." In effect, this is a "grandfather" clause that permits the past practice of using nonlongshoremen employees by employers and their subcontractors when such practices were followed as of July 1, 1978. Section 1.81 provides that an employer in a port covered by the contract who joins the PMA after July 1, 1978, who is not a party to any conflicting longshore agreement, becomes subject to this contract.

On June 19, 1979, C.U.T. and ILWU entered into a memorandum of understanding under which C.U.T. recognized its obligation to comply with all of the provisions of the July 1, 1978, ILWU-PMA contract. Though C.U.T. as a member of PMA was bound by that contract, C.U.T. specifically agreed in the memorandum of understanding to apply section 1.7 of that agreement 15 days after approval was received from the Federal Maritime Commission to operate the Long Beach facility. There is no specific reference in the memorandum of understanding to section 1.8 but that section is binding on C.U.T. because of C.U.T.'s membership in PMA.

Section 1.8 appears to "grandfather" two separate types of existing practices. Under section 1.8, a PMA member who used its own nonlongshore employees to maintain and repair containers and chassis prior to July 1, 1978, could continue to do so. In such circumstances the only consideration would be the union affiliation of the employer's own employees. There would be no subcontractor and no concept of "cessation of doing business" within the meaning of Section 8(e). However, section 1.8 also appears to provide that PMA members who prior to July 1, 1978 subcontract that work to vendors who use nonlongshoremen employees may continue that subcontracting practice "at the option of said employer." In order to give meaning to that clause, it is necessary to infer that PMA members who prior to July 1, 1978, did not subcontract such work to outside vendors who used nonlongshore employees may not, under the terms of the contract, subcontract such work to such outside vendors. Thus, a PMA member who goes into business after July 1, 1978, can have no past practice with regard to nonlongshore employees of its own or with regard to subcontracting the work in question. Such an employer must have the work of maintenance and repair of containers and chassis performed by longshore employees whether those employees are his own or a subcontractor's. In such circumstances the contract prevents the employer from doing business with a subcontractor who uses other than longshore employees.[12]

C.U.T. did not perform such work prior to July 1, 1978. It did act as an intermediary in obtaining the performance of such work for some of its shipping customers at its Wilmington facility but that did not constitute either doing the work with its own employees or subcontracting out its work. It has not even engaged in that intermediary function at its Long Beach facility. As a PMA member without the required past practice, when C.U.T. began doing such work at the Long Beach facility after July 16, 1979, the contract required it to do such work with its own longshore employees or with subcontractors who use longshoremen. The issue of subcontractors never arose at the C.U.T. facility because long before the contract in question C.U.T. had decided to use only its own employees. However, the existence of an 8(e) contract is unlawful even where there is no request or attempt made to enforce it. *American Feed Company*, 133 NLRB 214 (1961).

In sum, I find that the contract in question was an agreement, express or implied, whereby PMA members agreed to cease or refrain from doing business with subcontractors who did not have a collective-bargaining relationship with the ILWU in circumstances where the PMA member did not have a past practice of doing business with that subcontractor as of July 1, 1978. The contract, therefore, comes within the literal wording of Section 8(e) of the Act. However, the inquiry does not stop

[10] The Board has held that the maintenance of such a contract within the 10(b) period constitutes an "entry into" the contract within the meaning of the Act. *Dan McKinney Co.*, 137 NLRB 649 (1962). In any event, Respondents have not raised a 10(b) defense and it is therefore waived. *N.L.R.B.* v. *A. E. Nettleton Co., et al.*, 241 F.2d 130 (2d Cir. 1957).

[11] The Board has held that the "cease doing business" language of Sec. 8(e) applies when a contract interferes with normal business relationships. *International Longshoremen's Association Local 1410 (E. H. Mercer)*, 235 NLRB 172, 179 (1978). The legislature intended "cease doing business" to be synonymous with "refrain from doing business." *N.L.R.B.* v. *Joint Council of Teamsters No. 38, et al.*, 338 F.2d 23, 27 (9th Cir. 1964).

[12] I believe this to be a reasonable interpretation of the contract language. However, even if it could be construed to allow a PMA member who had no past practice prior to July 1, 1978, to do business with a non-ILWU subcontractor where that subcontractor had employed other than longshoremen prior to July 1, 1978, the contract would still restrict the right to do business in certain circumstances. In such a case the contract would still prevent a business relationship between a PMA member and a subcontractor where both went into business after July 1, 1978, and therefore neither had a past practice. That is not a purely hypothetical situation. Both C.U.T. and Off-Dock began doing the work in question after July 1, 1978. Thus, under the contract, C.U.T. could not subcontract that work to Off-Dock as Off-Dock did not employ longshoremen.

there. The Board and the courts have consistently held that Section 8(e) of the Act is not intended to proscribe contracts that preserve existing work for members of the bargaining unit and is only intended to proscribe agreements that have certain aspects of a secondary boycott.

In *National Woodwork Manufacturers Association, et al.* v. *N.L.R.B.*, 386 U.S. 612, 635 (1967), the United States Supreme Court held that Section 8(e) proscribed agreements that related to secondary boycotts and did not proscribe agreements that preserved existing work in the bargaining unit. After analyzing the legislative history of Section 8(e), the Court held that Section 8(e) "simply closed still another loophole" in the statutory proscription against secondary boycotts. The Court stated:[13]

> Although the language of Section 8(e) is sweeping, it closely tracks that of Section 8(b)(4)(A), and just as the latter and its successor 8(b)(4)(B) did not reach employees' activities to pressure their employer to preserve for themselves work traditionally done by them, Section 8(e) does not prohibit agreements made and maintained for that purpose.

Whether a contract provision has a primary or secondary aim turns on whether it "is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" or is "tactically calculated to satisfy union objectives elsewhere."

An agreement does not fall within the prohibition of Section 8(e) if the union's objective was preservation of work for bargaining unit employees. *N.L.R.B.* v. *International Longshoremen's Association, AFL-CIO, et al.*, 447 U.S. 490 (1980). That principle applies whether there is a single employer or multiemployer bargaining unit. *United Mine Workers of America and Bituminous Coal Operators Association (Dixie Mining Company)*, 165 NLRB 467 (1967), remanded 399 F.2d 977 (D.C. Cir. 1968); 188 NLRB 753 (1971).[14] In the instant case PMA and the ILWU bargained in a coastwide unit involving ports all along the West Coast. *Shipowners Association of the Pacific Coast, et al.*, 7 NLRB 1002, 1025 (1938); *ILWU, Local 13, et al. (California Cartage Company, Inc.)*, 208 NLRB 994 (1974), enfd. 515 F.2d 1017 (D.C. Cir. 1975). The July 1, 1978, contract which Contains the allegedly unlawful clauses is between the Pacific Maritime Association for its employer-members and the ILWU on behalf of itself and each of its longshore locals and clerks locals in California, Oregon, and Washington. However, ILWU Local 13 is the only Respondent Union in this case.[15] Though the various ILWU locals were all part of a multiemployer unit, the practices at the various ports differed substantially. In addition, there were many supplemental agreements between the locals and the employers in particular ports. The contracts which preceded the July 1, 1978, agreement between PMA and ILWU did not contain the contract clauses which are attacked in this proceeding. However, Seatrain Terminals and American President Lines had maintenance and repair work on containers and chassis performed in the San Francisco Bay area by ILWU members pursuant to a contract with ILWU Local 10. ILWU Local 29 had a contract with PMA covering such work in the San Diego area. ILWU Local 52A had a contract with American Transportation Center covering such work in the Seattle area. On and after July 1, 1978, various locals entered into other contracts at various ports. As is set forth below, ILWU Local 13, the Respondent Union in this case, did not even claim such work until after the execution of the July 1, 1978, ILWU-PMA contract. While the practices in the overall unit must be considered, they present such a varied and erratic picture that primary reliance must be placed on the situation as it existed within ILWU Local 13's jurisdiction. If ILWU Local 13, the Respondent Union, whose jurisdiction is in the Los Angeles-Long Beach area, used a contract device to acquire new work rather than to preserve work for the employees it represented, it cannot successfully defend against an 8(e) allegation merely by pointing to the fact that employees represented by a sister local in Seattle or elsewhere had previously performed the same type of work.[16]

The container revolution has spawned a storm of litigation affecting longshoremen in all the ports of the United States. Most of that litigation has involved the basic work of longshoremen, that is the loading and unloading of ships. Longshoremen traditionally loaded and unloaded cargo directly onto and off of ships. With the advent of containerization, an intermediate step Was used that in large measure eliminated the traditional work. Now containers are stuffed and stripped away from the docks, the containers are sealed and delivered to the dock, and the container is hoisted onto the ship. The longshoremen contend that the stuffing and stripping of containers is functionally equivalent to their former work of handling break-bulk cargo. On the other hand, the teamsters contend that the work is functionally equivalent to loading and unloading truck trailers, which they have traditionally done. The Board and the courts in a long series of cases have spelled out criteria to be used in determining whether contracts between employers and

[13] See also *N.L.R.B.* v. *Enterprise Association of Pipefitters, etc.*, 429 U.S. 507 (1977) in which the Supreme Court held that in order to be free from the 8(e) proscription, a contract had to have the objective of preserving a work traditionally performed by employees represented by the union and the employer had to have the power to give the employees the work in question. Where the contracting employer had no power to assign the work, it was held that the agreement would have the secondary objective of influencing whoever did have such power over the work. In the instant case, the PMA members who are bound by the contract do have power to assign the work of repairing and maintaining the containers and chassis.

[14] That principle is put somewhat in doubt by the language of the United States Supreme Court in *N.L.R.B.* v. *International Longshoremen's Association, supra*. In that case the Court held that it was concerned with the results of the collective-bargaining process as it affected the shipping industry in the ports of New York, Baltimore, and Hampton Roads, Virginia. However, as noted in fn. 10 of that decision, the New York Shipping Association, the Steamship Trade Association of Baltimore, and the Hampton Roads Shipping Associatin were only some of the members of a multiemployer bargaining association known as the Council of North Atlantic Shipping Association (CONASA) and CONASA has bargained with the ILA on a master-contract basis.

[15] ILWU is named as a party to the contract and IAM is an intervenor.

[16] The questions whether those sister locals obtained such work through agreements that violated Sec. 8(e) was not an issue in this case and no findings are made in that regard.

longshoremen's unions that limit the right of the employers to use nonlongshore contractors to do the stuffing and stripping work are simply preserving the work of the longshoremen or are unlawfully acquiring work that had been done by the teamsters. Much of the law that has developed in that regard is directly applicable to the instant case. Here the longshoremen have traditionally repaired and maintained cargo-handling equipment such as nets and pallet boards. With the advent of containerization, the use of that type of cargo loading equipment decreased and the longshoremen are attempting to obtain the work of repairing the containers and chassis, the use of which has caused the decrease in use of the traditionally cargo loading equipment. The IAM has traditionally maintained and repaired mechanical equipment, and the containers and chassis can logically be classified as such. As found above, Respondent ILWU Local 13 is bound by a contract with PMA which in certain circumstances not covered by a grandfather clause limits the right of the PMA members to have the work of repairing and maintaining containers and chassis performed by subcontractors who do not use longshoremen. The parallel between the stuffing and stripping cases and the instant case is very close and the law as it has evolved with regard to the stuffing and stripping must be considered.

In *ILWU, Local 13, et al. (California Cartage), supra*, the Board found that the work preservation concept could not be applied "so broadly as to encompass all efforts by unions to enlarge the work opportunities for members of a bargaining unit adversely affected by technological advances."

In a long series of cases, the Board has found against the Longshoremen in similar circumstances. In *International Longshoremen's Association (The Terminal Corporation)*, 250 NLRB 8 (1980), the Board adopted the Decision of the Administrative Law Judge which listed the names of a number of cases involving the Longshoremen and held:

> In each of those cases before the NLRB involving unfair labor practice charges, the Board held that the container rules and efforts to enforce them by employers and/or the ILA and constituent locals or affiliates were directed against neutral employers, and were consequently violative of Section 8(e) and/or Section 8(b)(4)(B) of the Act. The Board found that the work at issue was not the loading and unloading of ships, the traditional work of longshoremen, but the off-pier stripping and stuffing of containers. More specifically, the Board found stuffing and stripping of containers to be a new type of work which longshoremen had historically never done, and which they had no prescriptive right to perform. Consequently, the Board concluded that the ILA was engaged in work acquisition, and not in work preservation. The Board specifically rejected defense claims that the rules were intended to preserve work and thus were valid under principles enunciated in *National Woodwork Manufacturers Association*, 386 U.S. 612 (1967), and *American Boiler Manufacturers Association*, 404 F.2d 547 (8th Cir. 1978).
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> The Board has found similarly with respect to union action on the west coast of the United States involving containerization. *International Longshoremen's and Warehousemen's Union, and Local 10 and 13 (California Cartage Company, Inc.*, 208 NLRB 994 (1974) (finding violations of Sec. 8(e) and 8(b)(4)(B) in container rules and their enforcement by Pacific Maritime Association, an employers' association, and the ILWU and its locals), enfd., petition for review denied, 515 F.2d 1018 (D.C. Cir. 1975).

While the above cases show the evolution of the Board law in regard to the work preservation aspects of Section 8(e), the present controlling law is set forth by the United States Supreme Court in *N.L.R.B.* v. *International Longshoremen's Association*, 447 U.S. 490, 506 (1980).[17] The Court held:

> The Board held that "'[t]he traditional work of longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.'" 231 N.L.R.B., at 364 (decision of ALJ, adopted by the Board), quoting 221 N.L.R.B., at 959 (*Conex*); see 236 N.L.R.B., at 526. The Board then determined that the work in controversy was "the off-pier stuffing and stripping of containers," *ibid.*; see 231 N.L.R.B., at 364–365. Similarly, in *Conex* the Board stated, "It is clear from the record that the work in controversy here is the LCL and LTL container work performed by [the charging parties] at their own off-pier premises." 221 N.L.R.B., at 959. Because ILA members had never performed such work, the Board concluded that the Rules were an illegal attempt to reach out and acquire work that was not within the union's traditional work jurisdiction and which its members had never performed. We agree with the Court of Appeals that this approach to defining the work at issue was incorrect as a matter of law.
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> The Board's approach reflects a fundamental misconception of the work preservation doctrine as it has been applied in our previous cases. Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," *National Woodwork*, 386 U.S., at 699, including the nature of the work both before and after the innovation. In a relatively simple case, such as *National Woodwork*, or

[17] In that case the Supreme Court affirmed a decision by the Court of Appeals for the District of Columbia Circuit which denied enforcement and remanded two cases to the Board. *ILA (Dolphin Forwarding, Inc.)*, 236 NLRB 525 (1978); *ILA (Associated Transport, Inc.)*, 231 NLRB 351 (1977); both cases denied enforcement and remanded 613 F.2d 890 (D.C. Cir. 1979).

Pipefitters, the inquiry may be of rather limited scope. Other, more complex cases will require a broader view, taking into account the transformation of several interrelated industries or types of work; this is such a case. Whatever its scope, however, the inquiry must be carefully focused: to determine whether an agreement seeks no more than to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work,[22] and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.

The Board, by contrast, focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping. If found that work was similar to work those employees had done before the innovation, and concluded that ILA was trying to acquire the traditional work of those employees. That conclusion ignores the fact that the impact of containerization occurred at the interface between ocean and motor transport; not surprisingly, the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers. The Board's approach would have been entirely appropriate in considering an agreement to preserve the work of truckers' employees, but it misses the point when applied to judge this contract between the ILA and the shipowner employers.

[22] The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer. See *Pipefitters*, *supra*, at 510, 526.

The facts involved in the instant case are set forth fully above. In summary, longshoremen represented by ILWU Local 13 in the Los Angeles-Long Beach harbor area have traditionally performed the maintenance and repair work on cargo-handling equipment such as nets, wire slings, pallet boards, and barrels. In 1951, a description of the existing practices was spelled out in a jurisdictional agreement between ILWU Local 13 and the IAM. That agreement provided that the longshoremen had jurisdiction over "cable splicing, transporting to and from the docks all stevedoring equipment used in the loading and unloading of ships, trucks and railroad cars, the repair and maintenance of lift and pallet boards, the refueling of equipment on the docks and the installation of winch handles aboard ships." It provided that machinists had jurisdiction over the building, repair and maintenance of all automotive and mechanical equipment "such as automobiles, trucks, tractors, cranes, 4 wheelers, pipe trucks, lift trucks and all mechanical equipment used in the loading and unloading of ships, trucks and railroad cars." The situation on the Los Angeles-Long Beach docks remained substantially unchanged until the advent of the early stages of containerization in 1959 or 1960. To the extent that containers were utilized on the docks, there was less need for traditional cargo-handling equipment such as nets, wire slings, and pallet boards. Containers were lifted onto and off of the ships with the use of cranes and when the container was used, there was no need to lift break-bulk cargo onto ships with the use of nets or pallet boards and wire slings. To the extent that less traditional cargo-handling equipment was used, there was less need to repair such equipment and more need to repair containers and chassis on which containers were carried.

With the advent of containerization, ILWU Local 13 made no claim to the work of maintaining and repairing containers and chassis. The longshoremen simply continued to maintain and repair the traditional cargo-handling equipment that was still in use. Machinists represented by the IAM performed the maintenance and repair work on the containers and chassis. On January 24, 1973, ILWU Local 13 and the IAM put into a written jurisdictional agreement the practice that had developed with regard to the repair and maintenance of containers and chassis. That agreement specifically referred to containers. It provided that the longshoremen would "do the temporary container patch work (with tape) in the ship or on the outside dock area other than in the shop" and that machinists would "repair all containers." It also provided that the machinists would do the "repair of the tire and wheels" as well as the "container and trailer road checking."

The situation within ILWU Local 13's jurisdiction remained substantially stable in the years that followed and the machinists continued to perform the maintenance and repair work on containers and chassis. The longshoremen continued to perform the maintenance and repair work on those nets, wire slings, pallet boards, and other traditional cargo handling equipment. However, some other ILWU locals in different ports began to claim and obtain the work of repairing containers and chassis at those other ports. On July 1, 1978, the ILWU and PMA entered into the coastwide agreement that is in issue in this case. Apparently the ILWU was attempting to unify the situation throughout the ports and to see to it that all of its constituent locals obtained the maintenance and repair work for containers and chassis except to the extent that the "grandfather" clause permitted existing practices to continue. As found above, that contract, to which ILWU Local 13 was bound, on its face prohibited employers from doing business with subcontractors who did not use longshore employees where the employer did not have a past practice of using such subcontractors which preceded July 1, 1978.

The situation in this case is one step removed from that presented in the stuffing and stripping cases. Basically, longshoremen's work is to load and unload cargo. The stuffing and stripping cases present a problem which arises when that basic work of loading and unloading cargo is performed in containers that are loaded onto ships rather than being performed on the ship itself. In the instant case we are concerned with the maintenance and repair of equipment. The longshoremen perform such work on traditional cargo-loading equipment such as nets, wire slings, and pallet boards, but that work is

peripheral to the basic work of loading and unloading cargo. The longshoremen continue to perform that maintenance and repair work even though there is less of it to be done. Prior to the contract in issue the longshoremen represented by ILWU Local 13 had never performed the mechanical type of work necessary to maintain and repair containers and chassis except to the extent that they have placed temporary patches on containers. The work of maintaining and repairing containers and chassis is substantially different from that of maintaining such items as cargo nets. Different tools, skills, and experience are needed for the different types of work. It is true that as the use of containers grew, the use of the traditional cargo-handling equipment decreased and with it the repair on containers and chassis grew while repair on traditional equipment declined. However, that situation began in 1959 or 1960 and ILWU Local 13 did not even claim the work of maintaining and repairing containers and chassis until the execution of the July 1, 1978, ILWU-PMA contract. Even if the repair of containers and chassis is construed as simply a technological evolution from such matters as cargo net repair, ILWU Local 13 showed no interest in following and performing the changed work for some 18 years after the change began.[18] In the instant case ILWU Local 13 not only never claimed the work in question but affirmatively agreed in the 1973 jurisdictional agreement with the IAM that the work belonged to the machinists. In effect, ILWU Local 13 abandoned any claim it might have had to that work some 5 years before the execution of the contract in question in this case.[19]

Under all these circumstances, I find that, through the contract with PMA, ILWU Local 13 was attempting to acquire new work and was not attempting to preserve work traditionally performed by employees it represented. As found above, the July 1, 1978, ILWU-PMA contract in some circumstances prohibits employer-members of PMA from doing business with subcontractors who do not employ longshoremen and to that extent the contract violates Section 8(e) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of ILWU Local 13 and PMA, as set forth in section III, above, occurring in connection with the business operations of PMA and its employer-members set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that ILWU Local 13 and PMA have engaged in unfair labor practices within the meaning of Section 8(e) of the Act, I recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. PMA and its employer-members, Stone Tire, Off-Dock, and Dostal are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. ILWU and ILWU Local 13 are and each is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into and maintaining sections 1.7, 1.71, 1.8, and 1.81 of the July 1, 1978, contract between Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, ILWU Local 13 and PMA have violated Section 8(e) of the Act to the extent that those contract sections constitute an agreement express or implied that PMA employer-members will cease or refrain from subcontracting the work of maintaining and repairing containers and chassis to subcontractors who do not employ longshoremen.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[18] See *Sheet Metal Workers Union, Local 216, et al. (Associated Pipe and Fitting Manufacturers)*, 172 NLRB 35, 41 (1968), where the Board adopted the Administrative Law Judge's Decision which stated: While the Respondent may argue that its members once performed this work and therefore are entitled to recapture it, I cannot regard such an object to be a legitimate one in view of the history of 20 years or more during which [they have not performed that work].

[19] See *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc.)*, 221 NLRB 956, 959 (1975), enfd. on other grounds 537 F.2d 706 (2d Cir. 1976).